



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the  
Request for Opinion concerning  
the conduct of WARREN HARDY II,  
Member of the Senate, State of Nevada.

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Request for Opinion No.: 08-04C

### EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION REGARDING JUST AND SUFFICIENT CAUSE

#### **A. INTRODUCTION:**

The following is the Executive Director's recommendation based on the Investigator's report (TAB A).

Warren B. Hardy II (Hardy) has been a member of the Nevada Senate from 2002 to the present. He was elected in 2002 and reelected in 2006. In his private capacity, he has been President of the Las Vegas Chapter of the Associated Builders and Contractors, Inc. (ABC-LV) from 2001 to the present. ABC-LV is the Las Vegas chapter of a national trade association whose members are non-union general and specialty building contractors and other construction-related businesses.

Hardy allegedly violated:

- NRS 281A.420.2 when he acted upon legislation directly affecting ABC-LV members despite his commitment in a private capacity to the interests of those members.
- NRS 281A.420.4 and 281A.420.6 by not disclosing sufficient information on the record concerning his position as President of ABC-LV and his commitment in a private capacity to the interests of ABC-LV members.

## **B. SUMMARY OF REQUEST FOR OPINION (COMPLAINT):**

On March 5, 2008, a Request for Opinion (Complaint) was received from Richard B. Miller (Miller) via the law firm of McCracken, Stemerman & Holsberry, attorneys for Miller. The following is the substance of the complaint:

While a member of the Nevada State Senate, Hardy acted upon numerous matters in which he allegedly had a conflict of interest. The alleged conflict of interest stems from Hardy's legislative proposals, amendments, votes, and advocacy for passage or failure of bills directly affecting ABC-LV's members.

During the 2003 session, in his first term, Hardy:

- Introduced and voted for S.B. 114 relating to prevailing wages on public works projects (Response, Exhibit 14).
- Voted for S.B. 241 relating to construction defects and contractor right to repair (Response, Exhibit 15).
- Recused himself during committee but voted for S.B. 437 relating to law governing non-licensed builders of swimming pools (Response, Exhibit 16).
- Opposed A.B. 295 in committee but voted for the amended version relating to pre-qualifying contractors on public works projects (Response, Exhibit 12).
- Voted for A.B. 432 relating to reduced penalties for contractors who fail to submit certified payroll records on public works projects (Response, Exhibit 13).

During the 2005 session, in his first term, Hardy:

- Voted for S.B. 434 eliminating certain bonding requirements for swimming pool contractors (Response, Exhibit 10).
- Voted for S.B. 467 omnibus bill revising bidding processes on public works projects (Response, Exhibit 11).
- Voted to amend A.B. 210 relating to contractors record keeping on ethnicity and gender of workers (Response, Exhibit 9).

During the 2007 session, in his second term, Hardy:

- Voted for S.B. 201 authorizing certain methods of public contracting (Response, Exhibit 8).
- Voted on S.B. 279 omnibus bill relating to the Nevada Contractors Board and dissemination of information regarding construction defect complaints (Response, Exhibit 5).
- Voted against Assembly amendment of S.B. 509 that would have expanded the definition of "public works" to require the payment of prevailing wages on certain public works projects (Response, Exhibit 4).
- Voted for weaker provisions of A.B. 56 relating to penalties against contractors doing business with unlicensed contractors (Response, Exhibit 6).
- Voted for A.B. 110 to repeal the expiration of the property tax exemption for state-registered apprenticeship programs (Response, Exhibit 7).

### **C. JURISDICTION:**

In his capacity as a member of the Nevada Senate, Hardy is a public officer as defined by NRS 281A.160. As such, the Nevada Commission on Ethics (Commission) has jurisdiction over this complaint.

The Commission must decide, however, whether it has jurisdiction from Hardy's first term. NRS 281A.280 states that "[t]he Commission has jurisdiction to investigate and take appropriate action regarding an alleged violation of this chapter by a public officer . . . in any proceeding commenced by the filing of a request for an opinion," and that these provisions apply "to a public officer who **currently holds public office** . . . at the commencement of proceedings against him." NRS 281A.280 states that these provisions also apply to a public officer who "resigns or otherwise leaves public office after the commencement of proceedings against him or **within one year after the alleged violation or reasonable discovery of the alleged violation**" (emphasis added).

Some of the allegations occurred during Hardy's first term. More than one year has lapsed since his first term in office. Therefore, the Panel must decide if the Commission has jurisdiction to consider the alleged violations from 2003 and 2005. Under the plain reading of NRS 281A.280, since Hardy currently holds public office, the Commission's jurisdiction extends to Hardy's first term.

### **D. RELEVANT STATUTES AND OPINIONS (SEE ENDNOTES):**

**NRS 281A.160** "Public officer" defined.<sup>1</sup>

**NRS 281A.420** Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum . . .<sup>2</sup>

**Opinion No. 97-07**; requested by Janet Kubichek, Member, Humboldt County Commission.<sup>3</sup>

**Opinion No. 99-56**; requested by Bruce L. Woodbury, Member, Clark County Commission.<sup>4</sup>

**Opinion No. 03-34**; requested by Lynette Boggs McDonald, Member, Las Vegas City Council.<sup>5</sup>

**Opinion No. 05-16**; requested by Barbara Cegavske, Senator, Nevada State Legislature<sup>6</sup>

**Opinion No. 06-61, 06-62, 06-66, 06-68**; Michael Carrigan, Councilman, City of Sparks<sup>7</sup> (pending appeal)

### **E. RECOMMENDATION:**

On the issue of disclosure, the recommendation is that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.4 and NRS 281A.420.6.

On the issue of abstention, the recommendation is that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.2 in *the 2003 Legislative Session*.

## **RECOMMENDATION (CONTINUED)**

If the Panel finds that it has jurisdiction over *the 2005 Legislative Session*, then just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.2.

On *the 2007 Legislative Session*, the recommendation is that the Panel find that just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.2.

Only the full Commission has the authority to determine if Hardy's conduct in relation to these issues rises to the level of a violation of state law.

### **F. SUMMARY OF SUBJECT'S RESPONSE:**

On March 17, 2008 a Response was received from Hardy's attorneys, Brenda J. Erdoes, Legislative Counsel, Eileen G. O'Grady, Chief Deputy Legislative Counsel, and Scott McKenna, Senior Principal Deputy Legislative Counsel. The following is the substance of the response:

Hardy did not violate the provisions of the Nevada Ethics in Government Law. He complied with all the relevant requirements relating to disclosure during the 2003, 2005 and 2007 Legislative Sessions. Hardy did not violate the abstention provisions. None of the legislative measures identified by the Requestor would have caused the member-contractors of ABC-LV to accrue a greater benefit or detriment than that accrued by similarly situated non-member contractors.

NRS 281A.420.7 specifically authorizes a Legislator to introduce legislation that may involve his private employment or interests.

#### **2003 Legislative Session**

Hardy filed a written disclosure statement pertaining to his employment with ABC-LV on March 5, 2003. He initially made the disclosure orally on that date in the Senate Standing Committee on Government Affairs when several bills relating to construction were considered.

#### **2005 Legislative Session**

Hardy filed a written disclosure statement pertaining to his employment with ABC-LV on March 3, 2005. He initially made the disclosure orally on March 1, 2005 in the Senate Committee on Commerce and Labor during a hearing on S.B. 116.

#### **2007 Legislative Session**

Hardy filed a written disclosure statement pertaining to his employment with ABC-LV on February 14, 2007. He initially made the disclosure orally on that date in the Senate Standing Committee on Government Affairs during a hearing on S.B. 13.

The written disclosure statements filed by Hardy during the 2003, 2005 and 2007 Legislative Sessions were carefully and thoughtfully drafted for the specific purpose of complying with the Nevada Ethics in Government Law and incidentally mirror all the other written disclosure statements filed during those sessions by other Legislators with the Director of the Legislative Counsel Bureau pursuant to NRS 281 A.420(6).

#### **G. SUMMARY OF INVESTIGATOR'S ACTIVITIES:**

- Reviewed the thirty-two page Complaint with forty-two exhibits; verified document sources **(TAB B)**.
- Reviewed the twenty page Response and fifty-eight exhibits; verified document sources **(TAB C)**.
- Sent e-mail to Miller's attorneys requesting additional information regarding how and when Miller became aware of this issue.
- Sent e-mail to Hardy's attorneys requesting additional information regarding **(TAB D)**:
  - The process of compiling a Legislator's disclosure; audio available for each of those meetings during which Hardy made his oral disclosures as evidenced by the written disclosures for each session.
  - The powers, duties and responsibilities of a committee chair relative to the legislative process.
- Relevant Commission Opinions **(TAB E)**.

#### **H. CONCLUSION AND RECOMMENDATION:**

The Panel must consider whether Hardy should not have participated in certain legislative votes. NRS 281A.420.2. Further, the Panel must consider whether Hardy should have disclosed his commitment to others. NRS 281A.420.4, NRS 281A.420.6, NRS 281A.420.7.

Hardy argues that during the 1997 Session, both the State Senate and Assembly contemplated the meaning of the word "matter" in NRS 281A.420.6 on disclosure and determined that the disclosure should concern the general subject matter of the legislation and not specifically each individual bill.

For example, all new legislation related to construction could be covered by one oral disclosure made by a Legislator at the time new legislation related to construction was being considered, followed by a broadly crafted written disclosure filed with the Director of the Legislative Counsel Bureau that would cover all bills specific to matters related to contractors. The Legislative history indicates that there was significant discussion within both the Senate Committee on Government Affairs and Assembly Committee on Elections, Procedures, and Ethics as to how best to expedite this disclosure process.

The current practice is that a Legislator makes a broad oral disclosure at the first instance a general topic of new legislation is discussed by that Legislator, and not specifically at each time an individual bill related to the general topic is introduced or discussed. The first oral disclosure is followed by a written disclosure filed with the Director of the Legislative Counsel Bureau.

## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

The following facts apply to Hardy' disclosures:

### **2003 Legislative Session**

At the March 5, 2003 meeting of the Senate Committee on Government Affairs, Hardy made his oral disclosure when S.B. 19 was introduced. S.B. 19 was intended to make various changes relating to advertising and awarding contracts for certain smaller public works projects. The meeting minutes indicate "Senator Hardy disclosed he worked for a construction trade association." Subsequently, Hardy filed his written disclosure dated March 5, 2003 with the Director of LCB. (Response, Exhibit 17).

### **2005 Legislative Session**

At the February 21, 2005 meeting of the Senate Committee on Government Affairs, Hardy made his first oral disclosure of the 2005 Session during the hearing on S.B. 20, intended to revise provisions governing certain county fair and recreation boards. The meeting minutes indicate that Hardy stated the following:

This is an extremely meritorious bill. For the next two bills, I want to make a couple of introductions. Bill Nicholes, Mayor of the City of Mesquite, intended to be here, but could not. Randy Robison and Councilmen David Bennett and Marco Ruelas from the City of Mesquite are present. I do need to make a disclosure as we begin. Randy Robison is the individual who purchased my consulting business when I decided to switch sides. I have consulted with our legal counsel. I have been advised that because Mr. Robison did pay a fixed price and I have no ongoing financial interest in the business, I can vote on issues he represents. There will be a letter on file with the Legislative Counsel Bureau. Providing representation for the City of Mesquite is an issue I have been involved with for ten years. The City of Mesquite contributes significantly to the Las Vegas Convention and Visitors Authority (LVCVA). They share an alternating seat on the LVCVA board of directors with Boulder City, and do not have full-time representation. It is not my intent with this legislation to displace anybody or to change the nature of the way business is conducted at the LVCVA. Senate Bill 20 simply intends to provide permanent, full-time representation for all of the stakeholders in this endeavor. (Response, Exhibit 18).

The second bill referred to by Hardy was S.B. 30, intended to authorize certain cities such as Mesquite to establish wireless enhanced 911 service and impose surcharge for certain telephone services to pay for such service.

At the March 1, 2005 meeting of the Senate Committee on Government Affairs, Hardy made his second oral disclosure of the 2005 Session during the hearing on S.B. 116, legislation intended to make various changes to labor laws and powers and duties of the Labor Commissioner. The meeting minutes indicate that Hardy stated the following:

I am the president of the Associated Builders and Contractors of Southern Nevada. Mr. Robison and Bill Gregory are contract lobbyists with the association. I have spoken with the legal staff and they have advised me that I can disclose and vote on

## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

issues that they have testified on, as long as it does not impact our membership any more than it does any other membership. There will be a letter on file with the Legislative Counsel Bureau (LCB).

His oral disclosure occurred after several questions he asked of the labor commissioner and substantial discussion and between himself, the labor commissioner, other committee members, and other interested parties in attendance. Directly after a lobbyist for ABC-LV voiced concerns about the bill, Hardy made the oral disclosure referenced above. Hardy filed his written disclosure dated March 3, 2005 with the Director of LCB. (Response, Exhibit 18).

### **2007 Legislative Session**

At the February 14, 2007 meeting of the Senate Committee on Government Affairs, Hardy made his oral disclosure after S.B. 13 was introduced. S.B. 13 was intended to restrict local governments from enacting or enforcing certain local laws which regulate signs held, carried or displayed by persons on public sidewalks on the basis of content or viewpoint. The meeting minutes indicate that Hardy stated the following:

For the record, I am president of the Associated Builders and Contractors of Las Vegas, and our industry is heavily governed by the National Labor Relations Board.

Hardy filed his written disclosure dated February 14, 2007 with the Director of LCB. (Response, Exhibit 19).

### **Analysis of Legislation**

The following is the analysis of each bill submitted by LCB (***Response, Exhibit 43***) and whether there was a benefit or detriment to Hardy and/or his employer, ABC-LV, as compared to any other contractor or contractors.

#### **First Term, 2003**

**S.B. 114:** The provisions of this bill would have refined the payment of "prevailing wage" to restrict it to a newly-defined term of "recognized class of workmen." The provisions of the bill would also arguably have lowered the "prevailing wage" by a process of averaging as between both public and private projects, and by apparently limiting the requirement to pay "prevailing wage" to only "recognized classes of workmen."

**Disclosure:** S.B. 114 was first considered by Hardy when it was heard in the Senate Committee on Government Affairs on March 10, 2003. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 5, 2003.

**Vote:** Committee: Hardy moved to amend and do pass; Senate final passage: Hardy voted yea.

**Benefit:** No greater benefit or detriment was received by Hardy or anyone else since the bill died in committee.

## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

**S.B. 241:** The provisions of this bill established certain prerequisites (including notice, a right to inspect and a right to repair) before an action for constructional defects was allowed to be commenced.

Disclosure: S.B. 241 was first considered by Hardy when it was heard in the Senate Standing Committee on Commerce and Labor on March 19, 2003. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 5, 2003.

Vote: Committee: Hardy moved to amend and do pass; Senate final passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.

**S.B. 437:** S.B. 437 amended NRS 597.715 to add a new provision dealing with swimming pool or spa construction projects conducted on property owned by the builder. The new provision appears to limit the ability of other persons to consult on or assist with pool/spa construction projects conducted on property owned by the builder unless such persons are properly licensed, registered or certified, as applicable.

Disclosure: S.B. 437 was first considered by Hardy when it was heard in the Senate Committee on Commerce and Labor on April 4, 2003. This disclosure related to the swimming pool industry and therefore Hardy's written disclosure statement regarding his affiliation with ABC-LV that had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 5, 2003. A disclosure on this bill was unnecessary since Hardy no longer was a lobbyist for the industry. See In re Griffin. CEO 01-27 & 01-28 (Feb. 25, 2002) (finding no violation of disclosure requirement in former NRS 281.501 [currently codified as NRS 281A.420] where commitment in a private capacity ceased to exist and noting that "[t]here is nothing in the statute that requires a public officer to disclose that he has no such interest").

Vote: Committee: Do Pass; Senate Final Passage: Hardy voted yea.

Benefit: Hardy recused himself from voting on the matter in committee, saying he had been a lobbyist for the swimming pool industry during the 2001 Regular Legislative Session; but then (b) voted on the matter on the Senate Floor.

**A.B. 295:** The provisions of this bill made various changes with respect to the qualification of persons to bid on contracts for public works.

Disclosure: A.B. 295 was first considered by Hardy when it was heard in the Senate Committee on Government Affairs on April 30, 2003. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 5, 2003.

Vote: Committee: Hardy moved to amend with amendment one only and do pass; Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.



## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

**A.B. 432:** The provisions of this bill revised the provisions relating to penalties that could be imposed against contractors and subcontractors for failing to maintain certain records with respect to workmen employed in connection with public works.

Disclosure: A.B. 432 was first considered by Hardy when it was heard in the Senate Committee on Government Affairs on April 30, 2003. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 5, 2003.

Vote: Committee: Hardy seconded motion to amend and do pass; Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.

### **First Term, 2005**

**S.B. 434:** The provisions of this bill did several things in relation to pool and spa contractors: (a) prohibited non-licensed persons from performing work on residential pools and spas; (b) required the State Contractors' Board to adopt regulations creating certain contracting classifications under which pool and spa contractors could also do work on plumbing and gas lines; and (c) allowed certain experienced (5 years or more) pool/spa contractors to be relieved of the duty to post a cash bond with the State Contractors' Board.

Disclosure: S.B. 434 (2005) was first considered by Hardy when it was heard in the Senate Committee on Commerce and Labor on April 8, 2005. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 3, 2005.

Vote: Committee: Hardy seconded motion to amend and do pass; Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.

**S.B. 467:** The provisions of this bill did several things relating to public works: (a) allowed the letting of public works contracts without competitive bidding under certain conditions, if no bids were received in response to the initial advertisement; (b) prohibited local governments from contracting for the construction of public works with contractors not licensed pursuant to chapter 624 of NRS; (c) limited certain bids for public works to only having to include "first tier" subcontractors instead of all subcontractors; (d) allowed alternative dispute resolution as well as requiring arbitration clauses in public works contracts; (e) eliminated the restrictions that had once limited design-build contracts to sewage, HVAC and contracts of a certain minimum dollar amount (there is still a threshold for the minimum dollar amount relating to design-build contracts, but it is lower than it was previously); and (f) generally streamlined and opened up the design-build process to a wider variety of projects.

## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

This bill was supported by ABC-LV and introduced in the Senate Government Affairs Committee, of which Hardy is the Chairman. NRS 281A.420.7 permits the introduction and/or request of bills by any Legislator.

Disclosure: S.B. 467 was first considered by Hardy when it was heard in the Senate Committee on Government Affairs on April 11, 2005. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 3, 2005. During the hearing on S.B. 467, Hardy noted for the record that, in his capacity as president of ABC-LV, he did work on this issue in the interim.

Vote: Senate Final Passage: Hardy voted yea.

Benefit: The member-contractors of ABC-LV receive no greater benefit or detriment than other, similarly situated contractors.

**A.B. 210:** As amended by the Senate Government Affairs Committee (from which amendment the Committee did not recede), A.B. 210 became a resolution simply encouraging the inclusion of women and members of certain minority groups on public works projects, instead of the "statistical compilation on public works demographics" that the bill had been when initially introduced.

Disclosure: A.B. 210 was first considered by Hardy when it was heard in the Senate Standing Committee on Government Affairs on May 11, 2005. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since March 3, 2005.

Vote: Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.

## **Second Term, 2007**

**S.B. 201:** This bill was the "construction manager at risk" (CMAR) bill. Generally speaking, a CMAR is a person experienced in matters of construction who is able to assist a governmental entity by coordinating in and helping to develop the design and construction of a public works project.

Disclosure: S.B. 201 was first considered by Hardy when it was heard in the Senate Standing Committee on Government Affairs on March 12, 2007. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since February 14, 2007.

Vote: Committee: Amend and do pass; Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.

## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

**S.B. 279:** This bill made several changes relating to the State Contractors' Board and the regulation of contractors in general.

Disclosure: S.B. 279 was first considered by Hardy when it was heard in the Senate Standing Committee on Commerce and Labor on March 20, 2007. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since February 14, 2007.

Vote: Committee: Amend and do pass; Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.

**S.B. 509:** As amended, this bill proposed to reverse the effect of a court case that said the payment of prevailing wage was not required unless the construction project in question fit the definition of a "public work," regardless of whether a directly applicable statute stated that the project was subject to the provisions of "NRS 338.010 to 338.090, inclusive," within which block of sections the requirement to pay prevailing wage is set forth.

Disclosure: S.B. 509 and its companion bills (S.B. 512, S.B. 515 and S.B. 520) were first heard on April 2, 2007 in the Senate Committee on Government Affairs. Hardy's written disclosure statement regarding his affiliation with the Associated Builders & Contractors, Inc., Las Vegas Chapter (ABC-LV) had been on file with the Director of the Legislative Counsel Bureau for public inspection since February 14, 2007.

Vote: Committee: Amend and do pass; Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill died in committee leaving the matter regarding prevailing wage unchanged from the outcome of the court case.

**A.B. 56:** This bill, for the specific offense of "[k]nowingly entering into a contract with a contractor while that contractor is not licensed," effectively creates a graduated administrative fine depending on whether the offense is the first offense, second offense, or third or subsequent offense.

Disclosure: A.B. 56 was first considered by Hardy when it was heard in the Senate Standing Committee on Commerce and Labor on May 9, 2007. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since February 14, 2007.

Vote: Committee: Hardy seconded motion to amend and do pass; Senate Final Passage: Hardy voted yea.

Benefit: No greater benefit or detriment was received by Hardy or anyone else since the bill treats all contractors equally.

## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

**A.B. 110:** This bill repealed the prospective expiration of a tax exemption relating to real and personal property of an approved apprenticeship program.

**Disclosure:** A.B. 110 (2007) was first considered by Hardy on the Senate Floor on May 24, 2007. Hardy's written disclosure statement regarding his affiliation with ABC-LV had been on file with the Director of the Legislative Counsel Bureau for public inspection since February 14, 2007.

**Vote:** Senate Final Passage: Hardy voted yea.

**Benefit:** The member-contractors of ABC-LV receive no greater benefit or detriment than other, similarly situated contractors relative to the other apprenticeship programs available to them.

### **Conclusion**

Hardy relied upon the LCB legal staff for direction and guidance in considering the disclosure and abstention requirements. Further, Hardy's attorneys at LCB prepared his written disclosure documents.

The Nevada Legislature stated at NRS 281A.020.2(c):

Members of the Legislature serve as 'citizen Legislators' who have other occupations and business interests. Each Legislator has particular philosophies and perspectives that are necessarily influenced by the life experiences of that Legislator, including, without limitation, professional, family and business experiences. Our system assumes that Legislators will contribute those philosophies and perspectives to the debate over issues with which the Legislature is confronted. The law concerning ethics in government is not intended to require a member of the Legislature to abstain on issues which might affect his interests, ***provided those interests are properly disclosed and that the benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group.*** (emphasis added).

Hardy stated in his supplemental response received April 2, 2008, that:

Hardy has indicated that he has never discussed strategy with ABC's lobbyists regarding state legislation and has never discussed with ABC lobbyists how to secure a vote in favor or against legislation. In light of his experience in his private capacity, Hardy has also indicated that he does discuss construction-related matters with his fellow Legislators when they initiate the conversation but does not approach them or lobby them directly in any way.

As with the many other Legislators who are employed by businesses, firms and organizations that employ or have employees that serve as lobbyists during the legislative session, Hardy applies the applicable ethics laws on a case-by-case basis to determine whether he must disclose or abstain on legislation.

## **CONCLUSION AND RECOMMENDATION (CONTINUED)**

The Commission recently decided the Sparks City Councilman Carrigan matter on disclosure and abstention. This decision (Opinion No. 06-61, 06-62, 06-66, and 06-68) is currently on appeal to the First Judicial Court. Based on that opinion, despite the fact that Carrigan disclosed his relationship with a lobbyist who appeared before the Sparks City Council, and despite the fact that his attorney advised him he could vote on matters presented by the lobbyist, the Commission found he should have abstained. Likewise, Hardy should have abstained in 2005 (subject to finding of jurisdiction) and 2007 on those matters involving ABC-LV and its lobbyist.

### **Recommendation**

On the issue of disclosure, the recommendation is that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.4 and NRS 281A.420.6.

On the issue of abstention, the recommendation is that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.2 in *the 2003 Legislative Session*.

Based upon the Carrigan Opinion No. 06-61, 06-62, 06-66, and 06-68, the recommendation is that the Panel finds just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.2.

If the Panel finds that it has jurisdiction over *the 2005 Legislative Session*, then just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.2.

On *the 2007 Legislative Session*, the recommendation is that the Panel find that just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion on whether Hardy violated NRS 281A.420.2.

Only the full Commission has the authority to determine if Hardy's conduct in relation to these issues rises to the level of a violation of state law.

### **REPORT PREPARED BY:**

Matt C. DiOrio

MATT C. DI ORIO  
SENIOR INVESTIGATOR

DATED:

4/7/08

### **APPROVAL AND RECOMMENDATION BY:**

Patricia D. Cafferata

PATRICIA D. CAFFERATA, ESQ.  
EXECUTIVE DIRECTOR

DATED:

April 7, 2008

## ENDNOTES

- <sup>1</sup> **NRS 281A.160** 1. “Public officer” means a person elected . . . to a position which is established by . . . a statute of this State . . . which involves the exercise of a public power, trust or duty.
- <sup>2</sup> **NRS 281A.420** 1. Except as otherwise provided in subsection 2 or 4, a public officer may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.
2. . . . [I]n addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
- (b) His pecuniary interest; or
  - (c) His commitment in a private capacity to the interests of others.
- ➔ It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.
4. A public officer . . . shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:
- (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
  - (c) In which he has a pecuniary interest,
- ➔ without disclosing sufficient information concerning the . . . commitment or interest to inform the public of the potential effect of the action or abstention . . . upon the person to whom he has a commitment, or upon his interest. . . . [S]uch a disclosure must be made at the time the matter is considered. If the officer . . . is a member of a body which makes decisions, he shall make the disclosure in public to the . . . other members of the body.
6. After a member of the Legislature makes a disclosure pursuant to subsection 4, he may file with the Director of the Legislative Counsel Bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a Legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when the matter is further considered by the Legislature or any committee thereof.
7. The provisions of this section do not, under any circumstances:
- (a) *Prohibit a member of the legislative branch from requesting or introducing a legislative measure; or*
  - (b) *Require a member of the legislative branch to take any particular action before or while requesting or introducing a legislative measure.* (Emphasis added.)
8. As used in this section, “commitment in a private capacity to the interests of others” means a commitment to a person:
- (c) Who employs him . . . ;
  - (d) With whom he has a substantial and continuing business relationship; or
  - (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.
- <sup>3</sup> **NCOE Opinion 97-07** [W]e interpret NRS 281.501(2) to allow an otherwise legally conflicted elected official to “otherwise participate” in a matter by participating as a citizen applicant before the elected official’s body and by participating as a provider of factual information.
- <sup>4</sup> **NCOE Opinion 99-56** The Commission determined that Woodbury’s decision to abstain [i]n a particular matter . . . involves a case-by-case evaluation of relevant factors. Such factors include but are not limited to his son’s compensation arrangements with the law firm [that employs his son]; his son’s responsibilities with the law firm, including client development; his son’s involvement with the matter which is before the County Commission; his son’s involvement with the client represented by the law firm (whether or not limited to the issue before the county commission); and the compensation arrangements of the law firm with the client. Unless such information is made available to Woodbury, it will be difficult, if not impossible, for Woodbury to make an appropriate disclosure and an informed evaluation of whether to abstain. In these circumstances, Commissioner

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Woodbury, of course, acts at his peril in two respects: (a) deciding what detailed disclosures will be sufficient; and (b) deciding whether the specific matter also warrants abstention.

- <sup>5</sup> **NCOE Opinion 03-34** In performing their public duties, therefore, public officers must be mindful of the Nevada Legislature's public policy declarations of NRS 281.421 and conduct themselves to avoid conflicts between their private interests and those of the general public whom they serve. Public officers must also be mindful of the provisions of NRS 281.501 requiring them to adequately disclose private interests and commitments when considering matters before them and, as appropriate, refrain from advocating the passage or failure of matters and abstain from voting when their independence of judgment is materially affected by their personal commitments and/or interests.

[W]hen a matter is before the Las Vegas City Council that implicates Councilwoman Boggs McDonald's private pecuniary interests and/or commitments in a private capacity to the interests of others, the burden is on Councilwoman Boggs McDonald, pursuant to the provisions of NRS 281.501 and the Commission's interpretation of those provisions as set forth in Opinion 99-56 (the Woodbury Opinion), to disclose her private commitments and her pecuniary interests and the effect those commitments and interests can have on the decision-making process, and to make a proper determination regarding abstention where a reasonable person's independence of judgment would be materially affected by those private commitments and pecuniary interests. In making a disclosure, Councilwoman Boggs McDonald must disclose sufficient information concerning her commitments in a private capacity and her pecuniary interests to inform the public of the potential effect of her action as required by NRS 281.501(4); and, after making such proper disclosure, determine whether the independence of judgment of a reasonable person in her situation would be materially affected by her commitments and/or her interests, under the circumstances presented in a particular matter; and, if so, she must also refrain from advocating the passage or failure of the matter and abstain from voting upon the matter, all in accord with NRS 281.501(2).

- <sup>6</sup> **NCOE Opinion 05-16** The apparent intent of the ethical standards provided in NRS Chapter 281 is to prevent public officers and employees from becoming involved in situations generating conflicts between private and public interests so as to preserve and enhance public officers' impartiality and the public's faith in the integrity of government. See, NRS 281.421(2)(a) and (b).

In enacting Nevada's Ethics in Government Law, the Nevada Legislature declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." Further, the Nevada Legislature has declared that, "to enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the role of persons who are both public servants and private citizens." NRS 281.421.

In declaring the above public policy, the Nevada Legislature found, inter alia, that:

Members of the Legislature serve as "citizen Legislators" who have other occupations and business interests. Each Legislator has particular philosophies and perspectives that are necessarily influenced by the life experiences of that Legislator, including, without limitation, professional, family and business experiences. Our system assumes that Legislators will contribute those philosophies and perspectives to the debate over issues with which the Legislature is confronted. The law concerning ethics in government is not intended to require a member of the Legislature to abstain on issues which might affect his interests, provided those interests are properly disclosed and that the benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group. NRS 281.421(2)(c).

The apparent intent of the ethical standards provided in NRS Chapter 281 is to prevent public officers and employees from becoming involved in situations generating conflicts between private and public interests so as to preserve and enhance public officers' impartiality and the public's faith in the integrity of government. See, NRS 281.421(2)(a) and (b).

In performing their public duties, therefore, public officers must be mindful of the intent of the ethics in government law and conduct themselves to avoid conflicts between their private interests and those of the general public whom they serve.

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In that regard, the Code of Ethical Standards provided in Nevada's ethics in government law (NRS 281.481, et seq.) prohibits public officers and public employees from engaging in certain conduct that may engender an impermissible conflict of interest.

- <sup>7</sup> **NCOE Opinion 06-61, 06-62, 06-66 and 06-68** A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager . . . Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.